



Office of the Attorney General
State of Texas

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July 26, 1996

The Honorable Robert Junell
Chair, Committee on Appropriations
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 96-080

Re: Whether a former member of the
legislature may be appointed chancellor of
Texas Tech University (ID# 38944)

Dear Representative Junell:

You request our opinion regarding the authority of a former member of the legislature to accept employment as chancellor of Texas Tech University during the term for which he was elected.¹ Section 18 of article III, Texas Constitution provides, in relevant part:

No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature.

Texas Tech University is governed by a board of regents, in accordance with section 109.21 of the Education Code:

The government, control, and direction of the policies of the university are vested in a board of nine regents, who shall be appointed by the governor with the advice and consent of the senate.

The board is empowered, *inter alia*, to

provide a chief executive officer, who shall devote his attention to the executive management of the university and who shall be directly accountable to the board for the conduct of the university.

Educ. Code § 109.23. You indicate that the board of regents has designated the chancellor as the "chief executive officer" contemplated by the statute.

¹We understand the member at issue is currently holding office but intends to resign his legislative office before assuming the chancellor position and will not simultaneously hold the two positions. Therefore, we need not consider the application of dual office-holding prohibitions. See Tex. Const. art. XVI, § 40.

As the quoted statutes demonstrate, the appointment of a chancellor is the duty of the board of regents, acting alone. Thus, the position of chancellor is not one whose appointment is "made, in whole or in part, by either branch of the legislature." For purposes of this opinion, we will assume, without specifically determining, that the "emoluments" of the position of chancellor "have been increased" during the term of the legislator of whom you inquire. Since the position is clearly one "of profit," the answer to your question depends therefore upon whether the position of chancellor is a "civil office [] under this State."

As the court said in *Tilley v. Rogers*, 405 S.W.2d 220, 224 (Tex. Civ. App.--Beaumont 1966, writ ref'd n.r.e.), a "civil office" is a "public office." In *Aldine Independent School District v. Standley*, 280 S.W.2d 578 (Tex. 1955), the supreme court, in holding that an assessor-collector of taxes appointed by a school district's board of trustees is not a "public officer," quoted the test for making the determination of what constitutes a "public office"

the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public *largely independent of the control of others.*

280 S.W.2d at 583 (quoting *Dunbar v. Brazoria County*, 224 S.W.2d 738, 740 (Tex. Civ. App.--Houston 1949, writ ref'd)) (emphasis in original). Likewise, in *Kimbrough v. Barnett*, 55 S.W. 120 (Tex. 1900), the supreme court held that a "public officer" is "an individual [who] is invested with some portion of the sovereign functions of the government." *Id.* at 122.

In the case of Texas Tech University, we believe it is manifest that the board of regents, and not the chancellor, primarily exercises the "sovereign functions of the government," and that, to the extent that the chancellor exercises such functions, he does so under the direction and control of the board. The position of chancellor is not named in any statute. Rather, the regents, in following the statutory directive to select a "chief executive officer," have created the title of "chancellor." It is the board, rather than the chancellor, in whom is vested "the government, control, and direction of the policies of the university." The chancellor, as "chief executive officer," is "directly accountable to the board for the conduct of the university."

In a situation analogous to the one presented here, the court in *Pena v. Rio Grande City Consolidated Independent School District*, 616 S.W.2d 658 (Tex. Civ. App.--Eastland 1981, no writ), found that a school superintendent was not an "officer" for purposes of the nepotism statutes, since he

merely performs functions delegated to him by the trustees who do not by such delegation abdicate their statutory authority or control.

Id. at 660. Similarly, in Attorney General Opinion DM-212, we said that "individuals who perform sovereign functions under the direction of another are not officers." Attorney General Opinion DM-212 (1993) at 3. Finally, we believe it is useful to note that the mere use of the term "chief executive officer" in section 109.23 of the Education Code does not in itself require the conclusion that the position created by the board under that statutory authority--the chancellorship--thereby assumes the character of a "*public office*." In Attorney General Opinion DM-212, *supra*, we indicated that the mere designation of a person as a "peace officer" does not as a matter of law mean that such a person is a "public officer" for purposes of article XVI, section 40 of the Texas Constitution. *Id.* at 5.

We conclude that the position of chancellor of Texas Tech University is not a "civil office of profit" and thus, a former member of the legislature is not barred by article III, section 18 of the Texas Constitution, from assuming the chancellorship during the term for which he was elected.

S U M M A R Y

The position of chancellor of Texas Tech University is not a "civil office of profit" and thus, a former member of the legislature is not prohibited by article III, section 18 of the Texas Constitution, from assuming the chancellorship during the term for which he was elected.

Yours very truly,


Rick Gilpin
Deputy Chief
Opinion Committee